No. 11591

United States

Circuit Court of Appeals

for the Ninth Circuit

FRED GERARD and ROSE GERARD,

Appellants,

vs.

UNITED STATES OF AMERICA, J. L. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife and FRED SHUPE,

Appellees.

WILBUR P. WERNER
LOUIS P. DONOVAN
Shelby, Montana,
Attorneys for Appellees, Fred Shupe and Guy McConaha

Upon Appeal from the District Court of the United States for the District of Montana

Filed ..... SEP 1947

..... PAUL P. O'BRIEN, Clerk.

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WILBUR P. WERNER
LOUIS P. DONOVAN
Shelby, Montana,
Attorneys for Appellees, Fred Shupe and Guy McConaha

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ARGUMENT

This brief will be confined to a discussion of the following points:

(1) The United States District Court of Montana did not have jurisdiction of the subject matter of the action.

(2) The United States was an indispensable party to the action.

(3) The United States has not consented to be sued in an action of this character.

(4) The allegations of the complaint were insufficient to show that the case was one falling within the provisions of Sections 352 (a) or 352 (b), Title 25, U. S. C. A., and the complaint therefore did not state a cause of action.

The above points will be discussed in the order stated.

I.

THE UNITED STATES DISTRICT COURT OF MONTANA DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER OF THE ACTION.

(a) The action cannot be maintained under subdivision 1 of Section 41, Title 28 U. S. C. A., because the complaint contains no allegation as to the amount or value of "the matter in controversy." (28 U. S. C. A., Sec. 41, (1). Even if we concede, for the purpose of argument, that the facts set forth in the complaint are sufficient to show that the claims of the plaintiffs are based upon "the Constitution or laws of the United States or treaties made, or which shall be made, under their authority," such fact is not sufficient to confer jurisdiction of the action upon the District Court, unless "the matter in controversy exceeds, exclusive

of interest and cost, the sum or value of $3,000.00." (Sec. 41 (1), Title 28 U. S. C. A.) And the allegation of sum or value of "the matter in controversy" is jurisdictional.

> See authorities cited in Paragraph 252 of Annotations to Section 41, 28 U. S. C. A.

(b) The action cannot be maintained under subdivision 24 of Section 41, Title 28 U. S. C. A., nor under Section 345, Title 25 U. S. C. A. These sections have reference to an action to obtain an "allotment of land under any law or treaty" for an Indian, and have reference only to actions to obtain the original allotment. The present action is not of that character. This question has been expressly decided by this Court.

U. S. vs. Eastman (C.C.A. 9th) 118 Fed. (2) 421.

Construing the above provisions of the statute, this Court said:

> "It is plain from the whole statute that Congress intended merely to authorize suit to compel the making of allotments in the first instant. Here the allotments have already been made."

U. S. vs. Eastman, 118 Fed. (2) 421.

Appellee respectfully submits that there is no provision of the statute giving the United States District Court jurisdiction of an action of this character, especially in the absence of any allegation that the amount or value of the matter in controversy exceeds $3,000.00.

II.

THE UNITED STATES WAS AN INDISPENSABLE PARTY TO THE ACTION

The basic purpose of the action appears to be to obtain an adjudication by this Court that the fee simple patents, issued by the United States to the respective plaintiffs during

the year 1920, or prior thereto, are void or voidable and that the rights of the various defendants in the action are invalid, because of the invalidity of the fee simple patents through which the rights of the defendants are derived. Any such adjudication would have the effect of annulling and cancelling the fee simple patents and reviving the trust patents issued to the plaintiffs in 1918. Such adjudication and annulment of the fee simple patents would have the further effect of adjudicating directly, or by necessary implications, that the United States had breached its duties as trustee for the respective plaintiffs when it issued the fee simple patents and also to re-impose upon the United States, the duties and obligations of a trustee, holding in trust the lands described in the complaint for the use and benefit of the respective plaintiffs. In any such action, the United States is a necessary and indispensable party.

The rule is stated in Moore's Federal Practice as follows:

> "One who holds the legal title, even if it is only the bare legal title, such as a trustee for security or in escrow, or an assignee for the benefit of creditors, is an indispensable party to a suit in which the legal title will be affected. A trustee under a mortgage is an indispensable party in a suit by the mortgagor to set aside a foreclosure. So also a trustee under a mortgage is indispensable in a suit by the bondholders to foreclose, unless his interest is adverse to that of the bondholders, in which case he is only a necessary party."

2 Moore's Federal Practice, pp. 2151-2152, citing:

Wilson v. Oswego Township, 151 U. S. 56; 14 S. Ct., 259, 38 L. Ed. 70.

Thayer v. Life Assn. of America, 112 U. S. 717, 5 S. Ct. 355, 28 L. Ed. 864.

The plaintiffs in this action are not claiming, apparently, that they hold the legal titles to the lands described in the complaint, by virtue of the fee simple patents issued to them during 1920, or prior thereto. On the contrary, it is alleged in the complaint that the plaintiffs **"were and are** the owners of allotments on the Blackfeet Indian Reserva-

tion," etc. (Paragraph I of the Complaint). If the Court upholds this allegation of the complaint, the Court necessarily determines that the United States is the holder of the legal title and that it owes to these plaintiffs, and each of them, the duties and obligations of a trustee of an express trust. It seems clear that such duties and obligations of a trustee of an express trust. It seems clear that such duties and obligations cannot be imposed upon the United States by judgment entered in any action, to which the United States is not a party. It is equally clear that, unless the Court determines that the fee simple patents are void, no relief of any character can be awarded to the plaintiffs, or any of them. Certainly the United States cannot be bound by a judgment entered in a case, to which it is not a party, and if the Court should enter a judgment herein that the fee title patents are void and that the trust allotments are still in force and effect, or new trust patents should be issued, the judgment could be entirely ignored, at least by the United States, unless it is made a party to the suit.

U. S. v. Hellard, 64 S. Ct. 965, 88 L. Ed. 1326. 322 U. S. 363.

The Hellard case involved an action partitioning restricted Indian land. The United States had not been made a party to the partition suit. In a subsequent action brought by the purchaser at the partition sale to quiet his title, the United States, alleging that the partition proceedings were void "for lack of the United States as a party," appeared in the action, removed it to the Federal Court and nullified the partitioning judgment. In the course of its opinion, the Supreme Court said:

> "Restricted Indian land is property in which the United States has an interest."

If the United States has an interest in restricted Indian property, the legal title to which is vested in the Indian, then, for much stronger reasons, it must be said that the United States has an interest in trust patented land, the legal title to which is vested in the United States. The Hellard case clearly implies that no action may be maintained between third parties, affecting the title or right

of possession of either restricted Indian land or allotted land, to which the United States is not made a party, either plaintiff or defendant.

The objection that an indispensable party is not before the Court, may be raised at any stage of the proceedings, but it is properly raised at the earliest convenient stage.

2 Moore's Fed. Practice, page 2190;

Brown vs. Christman, 126 Fed. (2) 625;

Neher vs. Harwood, 128 Fed. (2) 846.

If the plaintiffs are unwilling or unable to bring an indispensable party within the jurisdiction of the Court, the action should be dismissed.

2 Moore's Fed. Practice, page 2190.

Hoover Co. v. Coe, Commissioner, 144 Fed. (2) 514;

Line Material Co. v. Coe, Commissioner, 144 Fed. (2) 518;

See also: New Mexico v. Lane, 243 U. S. 52; 61 L. Ed. 588, 37 S. Ct. 348.

The United States, which issued the fee simple patents, the validity or invalidity of which constitute the principal issue of law and fact in this case, is entitled to be heard upon this issue, before the patents are declared null and void. The United States is, therefore, interested in the action and an indispensable party thereto for two reasons:

(a) According to the claims of the plaintiffs, the United States holds the legal title to the property in question and owes to plaintiffs the duties of a trustee of an express trust, and any judgment rendered herein, granting the plaintiffs any relief whatsoever, would necessarily impose upon the United States, the duties and obligations of a trustee, notwithstanding the fact that the alleged trustee, through one of its departments, took action to terminate the trust by the issuance of fee simple patents; and

(b) The United States is interested in the action as a party to the contracts, i. e.: the fee simple patents—the

validity of which constitutes the principal issue in this case.

The District Court, in its decision rendered in Case No. 525, after a careful review of the authorities, held that the United States was an indispensable party to the action.

Rose Gerard et al vs. W. H. Mercer, et al., 62 Fed. Supp. 28

It is settled law that the United States cannot be sued without its consent.

U. S. ex rel Goldberg v. Daniels, 231 U. S. 218, 34 S. Ct. 84, 58 L. Ed. 191

It is equally well established that if an indispensable party is not within the jurisdiction of the Court, the suit will be dismissed.

Gnerich v. Rutter, 265 U. S. 388, 44 S. Ct. 532, 68 L. Ed. 1068

Webster v. Fall, 266 U. S. 507, 45 S. Ct. 148, 69 L. Ed. 411

Mines Safety Appliances Co. v. Knox, Sec'y., 59 F. Supp. 733

See also: First National Bank of Holdenville vs. Ickes, 154 Fed. (2) 851.

We respectfully submit that Appellees' motion to dismiss was properly granted and the action was properly dismissed by the District Court.

III.

THE UNITED STATES HAS NOT CONSENTED TO BE SUED IN AN ACTION OF THIS CHARACTER.

Nowhere in the statute is there any provision indicating that the United States has consented to be sued in an

action, the purpose of which is to annul the fee simple patent issued by the United States and to impose upon the United States the responsibility and duties of a trustee.

The only suggestion to the contrary made by Appellants is the provisions contained in subdivision 24 of Section 41, Title 28 U. S. C. A., and corresponding provisions in Section 345 of Title 25 U. S. C. A. But as heretofore decided by this Court, these sections have reference only to actions to compel the original allotment.

U. S. vs. Eastman, (C. C. A. 9th) 118 Fed. (2) 421.

Counsel for Appellants fails to point to any other provisions of the statute, which could possibly be construed as a consent to be sued by the United States. It is elementary law that the sovereign can be sued only by its consent.

Since the soverign has not consented to be sued by a private party in a case of this character and the action cannot proceed without the United States being made a party thereto, it follows that the action must be dismissed. Appellees' motion to dismiss upon this ground was properly granted.

IV.

THE ALLEGATIONS OF THE COMPLAINT WERE INSUFFICIENT TO SHOW THAT THE CASE WAS ONE FALLING WITHIN THE PROVISIONS OF SECTION 352 (a) OR 352 (b), TITLE 25, U. S. C. A., AND THE COMPLAINT THEREFORE DID NOT STATE A CAUSE OF ACTION.

The intent of Congress in enacting Sections 352 (a) and 352 (b), Title 25 U. S. C. A., is clearly indicated in the reports of the committee which recommended these bills for

passage and clearly shows that the execution of a mortgage upon the land or a conveyance of the land by the Indian grantee subsequent to the issuance of fee simple patent, is an implied consent to the issuance of fee simple and approval thereof.

Section 352 (a), 25 U. S. C., was enacted February 26, 1927 (25 U. S. C. A., Sec. 352 (a). It provided expressly that the relief therein provided was limited to cases where "the patentee has not mortgaged or sold any part of the land described in such patent."

25 U. S. C. A., Sec. 352 (a).

In the report of the Committee on Indian Affairs (Report No. 1896) filed in the House of Representatives and recommending passage of the Bill, the interpretation of the law is indicated in the following provisions of the report, to-wit:

> "Placing a voluntary encumbrance upon or disposing of lands so patented, must in law be considered as an acceptance of the fee patent and as a waiver of the tax exempt provisions of a trust patent, but where forced patent land has neither been encumbered nor sold by the patentee, such patent ought to be cancelled on application made to the Secretary of the Interior."
>
> (Report No. 1896 from Committee on Indian Affairs filed in House January 29, 1927)

This report was adopted by Congress and indicates the Congressional intention in enacting the provision.

Section 352 (b), 25 U.S.C.A., was enacted February 21, 1931. The intention of Congress, in enacting this latter provision, is clearly indicated by the report of the Congressional Committee which handled the Bill. Under date February 12, 1931, the Committee on Indian Affairs in the Senate reported the Bill for passage and in its report, expressed its interpretation of the Bill as follows:

> "It will be observed by the terms of the amendment, no title will be effected until the Secretary of the Interior has taken affirmative action by cancelling the illegally issued patent in fee, and in lieu thereof substituted a trust patent, and that when this has been done, the lands will have the same status as they would

have had if no patent in fee had ever been issued*****

"Under the law as it existed at the time the fee simple patents complained of were issued, it has been held by the courts that the Indians have vested right in the tax free status of their allotments during the trust periods fixed by law, and that such rights cannot be taken from them without their consent by the device of a forced patent.

* * * * *

Placing a voluntary encumbrance up, or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the tax exempt provisions of a trust patent, but where forced patent has neither been encumbered nor sold by the patentee, such patent ought to be cancelled on application made to the Secretary of the Interior*****."

"Taxes or even tax deeds cannot be said to be encumbrances of a character to prevent cancellation as these impositions are not voluntary * * * * * This committee was of the opinion that where land covered by such illegally issued patent had been either mortgaged or sold by the Indian to whom the patent was issued **that such mortgage or sale, as the case might be, would amount to an acceptance of the patent and that he could not be heard to say that such patent had been improperly issued."**

(Report No. 1595 from Committee on Indian Affairs filed in the Senate February 12, 1931, recommending passage of Act now Sec. 352 (b), Title 25 U. S. C. A.)

The same views had been expressed by the House Committee on Indian Affairs, which reported the Bill (HR 15267) to the House of Representatives (Report No. 2269 from Committee on Indian Affairs to HR 15267, filed in House January 14, 1931).

The views expressed by the respective Committees on Indian Affairs of the House and Senate, in reporting for passage the Acts now Sections 352 (a) and 352 (b) of Title 25 U. S. C. A., are in harmony with the general rule that acceptance of a deed or patent may be manifested by the fact that the grantee mortgaged or conveyed the property or a portion of same. The rule is states in Corpus Juris Secundum as follows:

"So there may be an acceptance by the retention of the deed by the grantee; by an assertion of title by him; by his conveyance or mortgage of the property; by acts of ownership generally in respect to the property."

26 C.J.S., p. 255

See also:

Lyon vs. Lyon (Cal. App.), 233 Pac. 988

Bradley v. Bradley, 171 N. W. 729, 185 Iowa 1272

Clark v. Skinner, 70 S. W. (2d) 1094, 334 Mo. 1190.

The rule is stated in American Jurisprudence as follows:

"In the determination of whether there has been an acceptance of a deed on the grantee's part, the inquiry is as to his intention as manifested by his words and acts. Express words and positive acts are not necessary; intention to accept may be inferred from such conduct as retaining possession of the deed, conveying or mortgaging the property, or otherwise exercising the rights of an owner."

16 American Jr., p. 525, Sec. 154, and cases cited.

The Montana statute provides that a contract may be ratified by subsequent consent:

"A contract which is voidable only for want of due consent may be ratified by a subsequent consent."

Sec. 7496 R.C.M. 1935

And the voluntary acceptance of a benefit of a transaction is equivalent to a consent to same.

Sec. 7497 R.C.M. 1935

The reports of the Congressional Committees which handled the Bills for the enactment of Sections 352 (a) and 352 (b), Title 25 U. S. C. A., show clearly the intention of Congress in enacting these provisions and also the Congressional understanding and interpretation of the previous law. These reports may be properly resorted to by the Court for the purpose of ascertaining the Congressional intent in en-

acting the law if there is otherwise any doubt about such intent.

59 C.J., p. 1021.

The excerpts from the Committee reports above quoted, leave no doubt as to the Congressional purpose and intent in enacting Sections 352 (a) and 352 (b), Title 25 U. S. C. A.

These Appellees respectfully submit that in all cases where the Indian grantee has mortgaged the land or conveyed the land or any portion thereof, he has by such act consented to the issuance of the fee simple patent to him, because otherwise he would not be in a position to mortgage or sell the property and obtain the proceeds from such transaction.

There are no allegations in the complaint herein to indicate that the case falls within the provisions of Sections 352 (a) or 352 (b), Title 25 U. S. C. A. Under the circumstances, the complaint does not state a cause of action and the District Court was correct in granting Appellees' motion to dismiss.

There are many other points involved in the case that ought to be discussed; but a discussion of same would unduly extend this brief. We believe that the points above set forth are sufficient to fully justify the dismissal of the action and that the judgment of the District Court should be affirmed.

WILBUR P. WERNER
LOUIS P. DONOVAN

Attorneys for Appellees Fred Shupe and Guy McConaha

APPENDIX

"Cancellation of patents in fee simple for allotments held in trust. The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefore by the allottee or by his heirs: Provided, That the patentee has not mortgaged or sold any part of the land described in such patent: Provided also, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued. (Feb. 26, 1929, c. 215, 44 Stat. 1247.)"

25 U. S. C. A., Sec. 352 (a)

"Same; partial cancellation; issuance of new trust patents. Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by morgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by sections 348 and 349 of this title, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents have never been issued: Provided, That this section and section 352a of this title shall not apply where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired. (Feb. 26, 1927, c. 215, Sec. 2, as added Feb. 21, 1931, c. 271, 46 Stat. 1205.)"

25 U. S. C. A., Sec. 352 (b)